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No. 89-1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD TILGHMAN, ET AL.,
Petitioners,

v.

ERIC KOLKHORST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

The Respondent files this Supplemental Brief in response to the Petitioners' Supplemental Brief and the Brief for the United States as Amicus Curiae.

ARGUMENT

The question presented in both the present case and King v. St. Vincent's Hospital, No. 90-889, is whether, pursuant to 38 U.S.C. §2024(d), an employee's right upon request to be granted a leave of absence to perform active duty for training in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave. The Petitioners argue that it is more appropriate for the Court to hear this case than King. The United States argues that the Court should defer decision on whether to hear this case until after it hears and decides King. Since it has been held below that

the Respondent's request for leave was reasonable, the Court should deny the petition for writ of certiorari and hear the King case in the event the Court desires to decide the question presented by both cases.

In this case, the Fourth Circuit has ruled that a request for leave under §2024(d) is not conditioned on the "reasonableness" of the employee's request. Importantly, the court further held that, in the alternative, even if there were such a requirement, Kolkhost's request for a leave of absence was reasonable and that the Baltimore City Police Department had violated his rights. Thus, even if this Court were to hold that a reasonableness test should be

applied, the result in this case would not change because the lower court has already determined that the request was reasonable. The very reason advanced by the Department for granting certiorari in this case is, in fact, the strongest argument against further review.

In contrast, the Eleventh Circuit has held in King that a request under §2024(d) is subject to a condition of reasonableness and that the request made in King was per se unreasonable. Should this Court wish to decide the question presented it should hear the King case because only the outcome in King can potentially be changed by this Court's decision on the question presented. Should the

Court rule either that there is no reasonableness requirement or that there is a reasonableness requirement and a three-year request is not per se unreasonable, then the outcome in King will change.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,
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